AN EXCEPTION TO THE HEARSAY RULE.

I.

WHETHER it is possible without calling in the aid of legislation to reduce all the rules of evidence, and particularly those dealing with hearsay, to a scientific instead of an historical basis is open to question. Professor Wigmore in his great work [1] has attempted to do this, and at least in the newer jurisdictions where the outlines of the rules are not yet clearly drawn it is to be hoped that his views may be followed and the desirable result achieved by the courts themselves. Even in the older jurisdictions there are certain rules in the law of evidence which are comparatively modern and have not yet become hardened into fixed principles. One would certainly seem justified in turning the light of reason upon such rules, and it should be permissible to criticize them analytically untrammeled by any historical shackles.

It is the purpose of this article to discuss one of these more recently formulated doctrines, namely, that exception to the hearsay rule which allows evidence to be presented of declarations of a person's intent in order to prove the doing of the act intended. At first thought it scarcely seems consonant with sound reason to admit evidence of John Doe's statement that he intended to go to Boston, for the purpose of proving that he did go; and yet to exclude his statement that he had been in Boston, when offered to prove the same thing. If this result offends our common sense, it behooves us to examine carefully both the hearsay rule itself and this exception to it, in order to discover whether or not these two seemingly opposed doctrines of the law turn out on analysis to be in fact consistent and based on correct legal reasoning.

The first step in such a proceeding is to define the hearsay rule. In order to do this, two questions must be answered: first, what facts are susceptible of being excluded by the hearsay rule? second, are all uses of such facts forbidden?

---

[1] Wigmore, Evidence (1904).

As a preliminary to any attempt to delimit the hearsay rule, it is desirable to consider the reason for having such a rule of exclusion at all. The hearsay rule is the result of the process of separation of the functions of jury and witness. Originally the jury were themselves witnesses. Gradually the custom arose of calling in other special witnesses who had a peculiar knowledge of the transaction, while the jury themselves still used their own knowledge as well as the general knowledge of the community. The formula of the witness at this stage of the law was "*quod vidi et audivi.*" "To state what someone else had seen and heard was the function of that someone else, and not of the witness." In time, however, the jury lost even their function of community witnesses and were restricted solely to drawing conclusions; but the old rule still remained, only the original perceiver could testify and second-hand information was not desired.[2] The modern rational explanation of the rule, according to Professor Wigmore, is the desirability of testing all testimony by cross-examination.[3] For there are three possible defects in human testimony: first, inaccurate perception; second, faulty memory; third, untruthfulness. When the testifier can be cross-examined, it is relatively easy to discover whether any of them are present. If, however, a man's declarations may be given in his absence, the danger of these defects makes the testimony of conjectural value. In particular, the third possibility, that of untruthfulness, constitutes a very great objection to receiving such evidence. Because of it the evidence may be as valuable for concealing, as for disclosing, the true facts. The harm done by the reception in some cases of untruthful testimony would be very great; great enough, it is considered, to outweigh the disadvantage of the loss of truthful testimony in other cases, and consequently to justify the exclusion of all testimony subject to the possibility of this defect. The other two defects often cannot possibly be present; for example, the statement of a present fact involves no memory, and the statement of mental condition involves no perception. Furthermore, even when they are present, they are very unimportant in comparison to the danger of untruthfulness, for at the worst they will merely lead to a slight misdescription of the true facts. So that although these further dangers usually

[2] Thayer, Preliminary Treatise on Evidence, 498–501.

[3] Wigmore, Evidence, §§ 1362, 1367.

exist, they are really only incidental; the possibility of untruthfulness is the essential in hearsay, and the true ground for the rule of exclusion. A recent text-book writer treats even this infirmative consideration as of little value, and asserts that it is not sufficient justification for excluding hearsay generally.[4] It may be questioned, however, whether the difficulty of distinguishing between honest and untruthful hearsay is not practically insurmountable in a system of law where a jury is the trier of fact; and it would seem that this rule, peculiar to Anglo-American law, is to be justified if at all because of that other peculiarity, the existence of a jury.

With this reason for the hearsay rule in mind, let us turn to the first of our questions; namely, what facts *can* be excluded by the hearsay rule? Can utterances alone be hearsay, and can all utterances be hearsay? As to the first part of this question, it is clear that non-verbal conduct might well be excluded; for example, waving a signal-flag or talking in sign-language is really one form of speech. On the other hand, some human conduct is clearly admissible; for example, the flight of an accused may be shown to prove his guilt.[5] What is the distinction? In each case the conduct is used to evidence a belief in order to prove the fact believed, and so in each case there seems to be a possibility of the same three defects which are usually present in hearsay. Yet there is a difference, which lies in this: in the first example the conduct was intended to convey thought, in the second it was not. When there is no intention to communicate to any one there is very much less chance that the act was done in order to deceive, and hence the third and fundamental danger in admitting hearsay does not here exist, or at least not so strongly. Furthermore, as a rule the fact believed in this latter class of cases is a simple one, and hence the first and second dangers are decreased. Accordingly, there appears to be a sound distinction between the cases, which may be formulated in the statement that only conduct apparently intended to convey thought can come under the ban of the hearsay rule. It is to be noted that the test employed is apparent intent, for it is obviously impossible to apply an internal standard in this con-

[4] Chamberlayne's Best on Evidence, 3 ed., 447, 448.

[5] State *v.* Rand, 33 N. H. 216 (1856); Commonwealth *v.* Tolliver, 119 Mass. 312 (1876).

nection.[6] With this test in mind we can answer the other part of the question put above: can all utterances be hearsay? As a rule, yes, for most utterances are intended to be a means of communicating thought; but in certain cases, no, as, for example, that of instinctive cries of pain, which according to the test suggested would not be hearsay.[7]

Having now seen what facts are susceptible of being excluded by the hearsay rule, our second question is, does that rule prevent every use of those facts? And if not, what use is forbidden? Obviously certain uses are not prevented, as when the saying of the words is in issue as it is in slander, or again when the speaking of the words is offered to show that the speaker was alive. The essential characteristic of hearsay is not present in such a use of the words; "the probative force" does not "rest in whole or in part on the credibility of the speaker," and so there is no possibility of the danger of untruthfulness being present.[8] Since the reason for the hearsay rule is the existence of this danger, Greenleaf's definition

[6] This conclusion would appear to be in accord with the authorities, although the distinction is not clearly made. Non-verbal conduct is generally admissible. See Phipson on Evidence, 5 ed., 207. Professor Wigmore's view does not seem clear. In one section (§ 459) he admits conduct and says that "the hearsay rule excludes only deliberate utterances in terms affirming a fact." In another section (§ 266 c), however, he takes the position that "conduct evidence as supporting an inference of the person's belief and thus of the fact believed, is in general . . . declared inadmissible, as being open to construction as assertions and therefore as mere hearsay. . . . Whatever instances of opposite tendency may be noted in the following sections and however well-founded they may be in a given case, they must be regarded as casual and unusual." The learned author then cites in §§ 268–293, 459–464, innumerable decisions of the "opposite tendency," and the only case cited in support of the supposed rule is Wright *v.* Tatham, 5 Cl. & F. 670 (1838), where the sending of letters to a testator by various persons was not admitted to show their belief in his sanity and thus the fact of his sanity. Whether or not in this case there is a hearsay use of evidence is discussed below; but that such evidence is susceptible of a hearsay use upon the test suggested is clear, for letters are apparently intended to convey thought.

Mr. Gulson (Philosophy of Proof, §§ 361, 362) seems to consider it impossible to draw any line and would exclude all such conduct; and it must be admitted that even on the test suggested it is a troublesome question to decide some of the cases he puts, as, for example (§ 197), when the position of the hands on the face of a clock is used as a ground of inference to the real time.

[7] Citation of authorities would be useless here, for even if such utterances are classified as hearsay, they are still admissible under the exception to the hearsay rule to be discussed later.

[8] Chamberlayne's Best on Evidence, 3 ed., 444.

of hearsay as "that kind of evidence which does not derive its value solely from the credit to be given the witness himself, but rests also, in part, on the veracity and competency of some other person," seems to be a correct expression of that use of evidence which is forbidden by the hearsay rule.[9]

A problem is presented in the application of this definition by a distinction which has been taken by Professor Wigmore. He declares that it is a hearsay use of evidence only when an express assertion is offered to prove the fact asserted. He then deduces from this definition that if the assertion "I did X" is offered to prove my belief at the time of speaking (supposing that under the issue my belief as to the doing is material), it is not a hearsay use; whereas if the statement "I think I did X" or "I know I did X" is offered for a similar purpose, it is a hearsay use.[10] It is submitted with deference that this definition is unsound and that such a distinction is an over-refinement.[11] For in the first place some implied assertions are clearly hearsay, as, for example, non-verbal conduct intended to express thought, where there is of course no express assertion;[12] or again the common case of an incomplete statement such as a sailor's cry of "land," which only impliedly asserts "I see land." If such implied assertions are recognized as hearsay, as they must be, the definition given above, limiting hearsay to express assertions, must be incorrect. Furthermore, how can the implied assertions of present thought in "I did X" be kept out of the category of hearsay if the above implied assertions are admitted?[13] There would seem to be no logical means of

[9] 1 Greenleaf on Evidence, 16 ed., § 99.

[10] Wigmore, Evidence, §§ 266, 459, 1715, 1788, 1790.

[11] Here again citation of authorities is not very helpful, for whether such statements are hearsay or not, they would be generally admissible under the hearsay exception to be discussed presently.

[12] As Wright *v.* Tatham, *supra*.

[13] In the cases of non-verbal conduct and incomplete statements it is true that there is no express assertion at all, and that the implied assertion is the one primarily intended to be made. But these are really not different from the statement "it will stop raining in an hour." In addition to the express assertion, there is in that case a necessary implication of an assertion that it is now raining and will continue to rain for an hour. As far as the intent of the speaker is concerned, while it is principally to give his thought as to the cessation of the rain, it is incidentally without doubt to assert its present existence and continuance. It is due only to a chance use of words that he did not say "the rain that is now falling will continue for an hour," in which case the express and implied assertions would have changed places, while the speaker's

making such a distinction, and accordingly, if the definition of a hearsay use of evidence is to be cast in terms of assertion, that phrase must be used to mean implied as well as express assertion, and the statements "I did X" and " I think I did X" must be similarly treated. Moreover, if we turn from logical analysis to the demands of policy, still less excuse appears for a definition which leads to such a distinction. Judged by the reason for the hearsay rule the use of the assertion "I did X," and that of the assertion "I think I did X," in order to prove belief at the time of speaking, are equally obnoxious. For the sole danger that exists in the case of assertions as to mental condition is the third and only important one, the possibility of untruthfulness; and that danger is of course identical in each of the two cases. For if the speaker is lying, the thing about which he is lying is in each case his present belief, although in the one case, owing to an elliptical manner of speech, he omits any express reference to his thought. Any differentiation between the cases therefore, whether in treatment or analysis, would be a complete departure from the spirit of the hearsay rule and a formalism unworthy of a rational analysis of the law of evidence.[14]

If, then, the true hearsay use is that which employs as a step in the reasoning a reliance upon the sincerity of the speaker, a question still remains as to the distinction between testimonial and circumstantial methods of employing hearsay evidence. Some confusion has arisen in this connection, chiefly because these terms have not been clearly defined. Whenever an assertion of a past

---

intent would have been undoubtedly the same. It would seem, therefore, that if in the above admitted cases implied assertions are hearsay, the implied assertions in the case just discussed must be similarly treated. And if that conclusion is reached the same result would have to follow in the case of implied assertions of present thought. For there again there is a necessary implication, namely, that since I now say I did X, I now think I did X; and there is at least an incidental intent to assert that present thought. That such an intent actually exists to a greater or less extent is apparent from the impossibility of distinguishing in that respect such assertions as "I know X happened," "I am certain X happened," "X certainly happened," "X really happened," and "X did happen."

[14] This criticism of the express assertion view would bring many cases classified by Professor Wigmore in his chapter on verbal acts, *i. e.*, conduct not hearsay, under the hearsay rule: but most of them would still be admissible under the exception as to declarations of intention to be discussed presently.

external fact is used as evidence of the proposition asserted, there is an inference, first, that since the speaker says it, he believes it now; second, that since he believes it now, he believed it then; third, that since he believed it then, it happened.[15] The first inference from assertion to belief may be based on any of three grounds: one, the truthfulness of the particular speaker; two, the truthfulness of men in general; three, the particular circumstances under which the assertion was made. Strictly this process is circumstantial reasoning, and all uses of hearsay might therefore be called circumstantial. It is, however, desirable to distinguish human testimony because of its peculiar characteristics noted above from other evidence, and it seems convenient to restrict the phrase "circumstantial" so as not to include any truly testimonial use; that is, any use employing the first inference that since the speaker says it he believes it now. Such a use of the words "circumstantial" and "testimonial" has the virtue of making a distinction in terminology between kinds of evidence which differ fundamentally, and of following the line of demarcation drawn by the hearsay rule.[16]

This definition of the term is not, however, always followed. According to Professor Thayer, there is a circumstantial use of a statement "whenever the circumstances of the case alone were enough to entitle it to credit, irrespective of any credit reposed in the speaker." [17] Such a use of the term, it is submitted, is undesirable, for neither in analysis nor in treatment can a distinction be made between the three possible grounds, noted above, for the inference from assertion to belief; namely, the truthfulness of the speaker, the truthfulness of men in general, or the guarantee of trustworthiness to be found in the surrounding circumstances. Even Professor Thayer makes clear, however, that no matter what

---

[15] The possibility that each of these three inferences may be wrong constitutes the three dangers in hearsay discussed above.

[16] An example of what is thus properly circumstantial evidence is the use of the assertion "I am alive" to prove that the speaker was then alive. Here, although the inference is from the assertion to the fact asserted, it is not via the inference from assertion to belief. The mere speaking is enough for the direct inference to the fact of the speaker's existence, and his belief is immaterial. Of course the fact that evidence is susceptible of a hearsay use will not prevent its reception when offered for a valid circumstantial use.

[17] Preliminary Treatise, 522.

terms be employed, any inference from assertion to belief is forbidden by the hearsay rule.[18]

Professor Wigmore uses the term in still a different manner, and his difference in analysis has led to a difference in treatment. As noted above, he considers the inference from an assertion of a fact to the assertor's belief to be a circumstantial use of the evidence, and therefore conceives that it is not barred by the hearsay rule; although even he admits that if a second inference were then taken, from the belief to the fact asserted, there would be an evasion of the hearsay rule, and hence that this inference may not be made.[19] It may be queried, if the first inference were really circumstantial and the evidence not barred by the hearsay rule, — a problem discussed above, — how the mere making of a second and clearly circumstantial inference could be prevented by the hearsay rule. It is submitted that only by adopting the definition of the terms suggested above can clear thinking on this subject be attained.

Summarizing the answer to our second question, what is a hearsay use of a statement, we can say that it exists whenever the probative force of the words offered in evidence depends upon the making of an inference from an express or implied assertion to the belief of the assertor in the fact asserted, or, more briefly, whenever it depends on the assumption that the speaker is telling the truth.

II.

Having now endeavored to mark off the field of the application of the hearsay rule, we are better prepared to attack our original problem: does the exception to the hearsay rule allowing in evidence declarations of intent in order to prove the doing of the act intended constitute a valid exception?

At the outset this exception must be distinguished from a closely analogous one, namely, that declarations of mental condition are admissible whenever a mental state is in issue.[20] The reason for

[18] Preliminary Treatise, 523; Legal Essays, 265.

[19] Wigmore, Evidence, § 267.

[20] Pain: Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832 (1886); Goodwin *v.* Harrison, 1 Root (Conn.) 80 (1781). Emotion: Robinson *v.* State, 57 Md. 14 (1881); Ash *v.* Prunier, 105 Fed. 722 (1901). Motive: Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294

this latter exception lies in the nature of the thing to be proved; circumstantial evidence is comparatively inadequate to reveal internal states. The person himself alone really knows them, and so by necessity resort must be had to his statements concerning them. Of course the danger of untruthfulness is present, but it is lessened by a power of discretion in the court to refuse the evidence if the statements were made under circumstances at all suspicious; and whatever danger still remains is outweighed by the need of the evidence. An analysis of this rule yields four subdivisions: (1) statements of present mental condition are admissible to prove that mental condition when in issue; (2) statements of present mental condition are admissible to prove inferentially future mental condition when in issue; (3) statements of present mental condition are admissible to prove inferentially past mental condition when in issue; (4) statements of past mental condition are admissible to prove past mental condition when in issue. The propriety of the inference in the second and third classes is undoubted.[21] No real distinction can be made between any of the classes, although it has been argued that the statements in the first three classes are more apt to be truthful, and those in the fourth least apt to be so; and accordingly these last are excluded by many courts, particularly when they are statements as to past pain.[22] It is submitted that the classes cannot be distinguished on that ground, for a statement "I think that X happened" is no more trustworthy to prove present thought if in issue than a statement "I then thought X happened" is to prove the past thought. Each statement is sufficiently untrustworthy to be excluded were the issue the happening of X; and it is difficult to see how for our present purpose a greater probability of truthfulness can be found in the one than in the other. Furthermore, on the view suggested above, the statement "X happened" contains equally implied assertions of present and of past mental condition, both of which

(1894); Steketee *v.* Kimm, 48 Mich. 322, 12 N. W. 177 (1882). Intent: Ridley *v.* Gyde, 9 Bing. 349 (1832); Carter *v.* Gregory, 8 Pick. (Mass.) 164 (1829); Cole *v.* Inhabitants of Cheshire, 1 Gray (Mass.) 441 (1854); Inhabitants of Gorham *v.* Inhabitants of Canton, 5 Me. 266 (1828). See also cases cited in Wigmore, Evidence, §§ 1718, 1729, 1730, 1783, 1784.

[21] Wigmore, Evidence, § 1737, 2 b.

[22] Lush *v.* McDaniel, 13 Ired. (N. C.) 485 (1852); Girard *v.* Kalamazoo, 92 Mich. 610, 52 N. W. 1021 (1892). See also cases cited in Wigmore, Evidence, § 1722 b.

are obviously of the same degree of truthfulness. However, it is undoubtedly true that statements of present pain are more reliable than those of past pain. The chief ground of the distinction is that statements of present pain are usually made under circumstances which tend to guarantee their truthfulness. But it is to be noted that the effect of such reasoning is merely to add to the probability of truth of the statements of present pain and not to lessen such probability in statements of past pain, and that these last still remain of the same degree of trustworthiness as statements of other present or past mental conditions, and hence should be admissible, at least as far as this argument is concerned. The authorities excluding them might be supported on the distinction that statements of past pain are peculiarly subject to the defect of faulty memory, and that while in other cases of the third and fourth classes the step, that since the speaker now believes a certain thing, therefore he then believed it, can be taken with safety; yet in this case it should not be taken, because the danger of incorrect memory is unusually great, since it is almost impossible to remember the details of past suffering in anything more than the roughest outline without making many errors. It is suggested, however, that the more flexible rule allowing in evidence even declarations of past pain whenever made under circumstances of naturalness and without apparent motive to deceive would be a preferable one.

This, then, is the recognized exception: declarations of mental condition are admissible whenever a mental state is in issue. But in the case of Mutual Life Insurance Co. *v.* Hillmon [23] the Supreme Court took a further step and allowed in evidence declarations of intention when the fact in issue was not a mental condition, but the act intended. And it is the validity of that step that it is here sought to question.

At first sight this step perhaps appears no step at all. If declarations of intention are admissible to prove future intent, and if that future intent is evidence of a future act, it follows that declarations of intent can come in to prove the act intended. Yet is that a necessary conclusion? Two arguments oppose it.

In the first place, the reason for the exception as to statements of mental states when the mental state is in issue is, as we have seen,

[23] 145 U. S. 285 (1892).

the peculiar need of them. We *had* to prove the mental state; in order to do that satisfactorily we were compelled to make an exception to the hearsay rule and let in declarations as to it. But when the mental state is not in issue the aspect of the matter is entirely changed. Now the fact we *must* prove is an external act. And intention to do that act is only one of various possible methods of proving that the act occurred; and a weak one. The intention is not a necessary fact. Therefore the declarations are not necessary. Accordingly no principle of necessity exists in such cases, and there is no rational justification for making an exception to the hearsay rule.

The argument just made is purely negative. Still stronger is the affirmative reasoning that if such evidence is admissible, logically all hearsay would be. The steps in such an argument are as follows:

1. If declarations of intention are admissible to prove a future act, logically they would be admissible to prove a past act. For the inference from a present intent to a past intent can under proper circumstances be just as sound as the inference from a present intent to a future intent. An illustration of such a case is a declaration by a testator as to the disposition which he intends to make of his property, offered as evidence of the contents of a will made previously. The admissibility of such declarations would seem to follow necessarily from the Hillmon case.

2. If this step is taken, logically declarations of a present belief as to a past act would be admissible to prove a past act. If the statement "I intend to leave A. $1000" is evidence that a will which I made last week contained such a bequest, is not the statement "I know I left A. $1000" equally admissible for the same purpose? Each is a statement of present mental condition, the only distinction being the purely formal one that one is intent and the other belief; surely upon that no real difference can be based. Further in each case there is a similar inference from present to past mental state; which inference is, if anything, stronger in the case of memory than in that of continuing intent. Finally, a distinction might be taken that statements of intention are more apt to be trustworthy than are statements of belief as to a fact. For such an argument it is, however, difficult to find support. Cases are familiar in the law of deceit where the misrepresentation is as

to intention, and it would be rash to assert that such occur less frequently in proportion to the total number of statements of intent made, than representations as to facts occur in proportion to the total number of assertions of fact. *A priori* there seems no reason to believe that mankind has a higher sense of honor in regard to statements of intent than as to other statements; nor is it possible to assert that there are fewer motives for lying as to one's intent than as to a fact.[24] In every respect the cases are alike, and on any rational basis it would therefore seem necessary to admit the second statement if the first comes in.

3. Having progressed thus far, the gates are open wide enough to admit all hearsay. For if hearsay declarations are admissible to prove past acts of the speaker, it would seem logically necessary to admit them in order to prove past facts of his observation. It might be argued that one of the incidental defects of hearsay, inaccurate perception, is present to a stronger degree in the latter class. Yet it is submitted that even here there is no substantial distinction, for the statement of an act such as "I went to 25 Tremont Street" really involves as much danger of inaccurate perception as the statement of any fact of past observation.

It appears, therefore, that by a process of logical deduction we have reached the conclusion that to follow the Hillmon case consistently leads to the abolition of the hearsay rule. It is impossible, if the law of evidence is to be a rational science and not merely a collocation of arbitrary historical rules, to have the Hillmon case and the hearsay rule stand side by side. It is submitted that the courts have failed to see where the Hillmon rule leads, because of their neglecting to make the absolutely necessary distinction between declarations of intent to prove a future intent in issue and similar declarations to prove a future act. If any position is

[24] It may be noted that if a man is trying to lie about a past act, even such as the contents of a will, he usually will state the fact and not his present continuing intent. It does not follow from that, however, that statements of fact are more apt to be untrustworthy than statements of intention. For even if the speaker is trying truthfully to tell the contents of a past will, he is apt to use the form of stating the past fact rather than the continuing intention. In other words, stating present continuing intention, when the act has been done although its effect is to come in the future, is a rather unusual way of expressing oneself; and since there is a smaller total of such statements, there is a smaller number of lying statements of that kind. Yet the probability of any particular statement being untruthful would seem to be the same, whether the statement is of intention or of fact.

to be taken short of letting in all hearsay, the line of demarcation must be drawn with a firm hand at this point.

It may be said that this reasoning leads to a harsh result; that to exclude the evidence in the Hillmon case would have been to keep out the truth; and that in reality the evidence was as much needed there as in most cases where mental condition is in issue. The answer to this is short: the hearsay rule often reaches the same regrettable result of excluding truth, and often when it is most needed. The quarrel is not with the reasoning, but with the hearsay rule itself. Perhaps, as has been noted above, the dangers in hearsay are not really so great as to overbalance the disadvantage of losing the evidence. It may be that instead of being a rule of exclusion it should be made a rule of preference, and in cases like the Hillmon case, where the evidence is greatly needed and none other can be obtained, hearsay should be admissible.[25] But that is a speculative problem. Without legislation we cannot expect to eliminate the hearsay rule. And since we have it, any exception to it other than those which exist as inherited idiosyncrasies of the law of evidence must be based on some rational ground; we cannot say arbitrarily that in a certain class of cases where the word "intend" is used, that we will not apply the rule. That is a mere stultification.

III.

In conclusion, a reference to the authorities is necessary. There are three classes of cases which appear to support the Hillmon rule:

1. Declarations of a deceased testator are admissible in evidence in various ways:

a. "In the well-known case of equivocation, extrinsic utterances of intention are received in aid of construction." [26] Here obviously the intention is in issue, and the authorities which admit both contemporaneous declarations and those uttered shortly before or

[25] It may be noted in this connection that in Massachusetts by statute declarations of deceased persons are admissible in evidence. Mass. Rev. Laws, 1902, c. 175, § 67. See Thayer, Legal Essays, 303.

[26] Thayer, Cases on Evidence, 2 ed., 641, note; Wigmore, Evidence, § 2472, and cases there cited.

after the execution of the instrument are within the proper exception as to declarations of intention which has been outlined above.

b. Statements of a present intent to revoke whether made simultaneously with, subsequently to, or prior to the act of revocation, and subsequent statements of a past intent to revoke, are admissible when the act of destruction or cancellation by the testator is conceded.[27] Here again intent is the issue and the result is thoroughly sound.

c. Ante-testamentary statements of intent have been admitted to prove a future external fact, such as the execution of a will, its contents, or an act of revocation. The principal case in support of this doctrine is Doe d. Shallcross *v.* Palmer.[28] The Supreme Court of the United States, however, in Throckmorton *v.* Holt [29] refused to follow this rule. Referring to such declarations the court said: "After much reflection on the subject, we are inclined to the opinion that the principles upon which our law of evidence is founded necessitate their exclusion." [30]

d. Post-testamentary statements have been similarly admitted to prove a past fact, it being apparently immaterial whether they are in the form of stating an intent or a past fact, a distinction discussed above. Sugden *v.* Lord St. Leonards [31] is the leading case for this view, but the weight of authority is against it.[32] Logically these last two classes of cases (*c* and *d*) are, as suggested above, indistinguishable; and the Supreme Court in Throckmorton *v.* Holt, while discussing ante-testamentary and post-testamentary

---

[27] Powell *v.* Powell, L. R. 1 P. & D. 209 (1866); Whitney *v.* Wheeler, 116 Mass. 490 (1875); Pickens *v.* Davis, 134 Mass. 252 (1883); Stewart *v.* Stewart, 177 Mass. 493, 59 N. E. 116 (1901); Lawyer *v.* Smith, 8 Mich. 411 (1860); and cases cited in Wigmore, Evidence, §§ 1737, 1782.

[28] 16 Q. B. 747 (1851). *Accord*: Gould *v.* Lakes, L. R. 6 P. D. 1 (1880); Hope's Appeal, 48 Mich. 520; and cases cited in Wigmore, Evidence, § 112.

[29] 180 U. S. 552 (1900). This decision is of course inconsistent with the Hillmon case.

[30] 180 U. S. 552, at 573.

[31] L. R. 1 P. D. 154 (1876).

[32] Quick *v.* Quick, 3 Sw. & Tr. 442 (1864); Boylan *ads.* Meeker, 28 N. J. L. 274 (1860). See also cases cited in Wigmore, Evidence, § 1736; and Phipson on Evidence, 5 ed., 305–309. In this connection it is to be noted that where the fact to be proved is undue influence or the like, then mental condition is really an issue, and declarations as to it are, as seen above, properly admissible. When insanity is the issue, the declaration might be similarly classified; yet in most cases probably no hearsay question is involved, for the statements are valuable circumstantially apart from any reliance on the veracity of the speaker.

declarations of intention, declares "that there is no good ground for a distinction" between them.[33] It is submitted, therefore, that if the cases opposed to Throckmorton *v.* Holt stand for anything they must be classed with Sugden *v.* Lord St. Leonards as an anomalous exception which allows in all hearsay in the case of deceased testators; a justification for which anomaly it is hard to find.

2. In the United States very generally threats by the deceased against one charged with homicide are admissible under the issue of self-defense to prove who was the assailant, even though they were uncommunicated to the accused.[34] This rule seems limited by the requirement of some other evidence of an act of aggression by the deceased, and its outlines in general differ in different jurisdictions. The rule appears to have arisen from a confusion of the doctrine of *res gesta*, and that of communicated threats, admissible under a plea of self-defense to show the defendant's reasonable belief of danger of attack — this last obviously a truly circumstantial use.

3. Finally, apart from the authorities following the Hillmon case, there are in the United States a few scattering precedents admitting intention to prove the act intended, mostly cases where the issue involves the whereabouts or conduct of a victim of a crime.[35] They are based wholly on the *res gesta* doctrine, and in nearly all of them the doctrine seems to be misapplied.[36]

It would seem, therefore, that the previous authorities did not necessitate or justify the broad rule laid down in the Hillmon case. And if there is any force in the arguments set forth in the preceding pages, there is no foundation in reason upon which such an exception to the hearsay rule can be based.

Eustace Seligman.

NEW YORK CITY.

---

[33] 180 U. S. 552, at 572.

[34] People *v.* Arnold, 15 Cal. 476 (1860); Stokes *v.* People, 53 N. Y. 164, 174 (1873); Wilson *v.* State, 30 Fla. 234, 11 So. 556 (1892); and cases cited in Wigmore, Evidence, §§ 110, 111.

[35] State *v.* Smith, 49 Conn. 376 (1881); Hunter *v.* State, 40 N. J. L. 495 (1878); Timmons *v.* Timmons, 3 Ind. 251 (1851); State *v.* Dickinson, 41 Wis. 299 (1877).

[36] For a discussion of that aspect of such statements, particularly with reference to the English cases, see Phipson on Evidence, 5 ed., 53.